



# **THE ADMINISTRATIVE STATE PROJECT**

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***WHAT DOES LUCIA V. SEC MEAN FOR  
THE ADMINISTRATIVE STATE?***

**BALLOTPEDIA**

The Encyclopedia of American Politics

## WHAT DOES *LUCIA V. SEC* MEAN FOR THE ADMINISTRATIVE STATE?

**Question presented before the Court:** “Whether administrative law judges (ALJs) of the Securities and Exchange Commission (SEC) are Officers of the United States within the meaning of the Appointments Clause.”

**The issue:** Is it constitutional for federal agencies to employ administrative judges for enforcement proceedings if they have not been appointed under the requirements of the Appointments Clause?

**Argument:** April 23, 2018

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**Executive summary:** [Lucia v. SEC](#) concerns the role of ALJs within executive branch agencies, including their exercise of judicial and legislative functions otherwise reserved for the judiciary and Congress by the U.S. Constitution. The case raises the question of whether the adjudicatory proceedings conducted by these ALJs are constitutional if the ALJs have not been hired under the requirements of the Appointments Clause. The Appointments Clause is much more than simply a procedural directive. It is an essential safeguard for political accountability, the separation of powers, and the rule of law.

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### CASE BACKGROUND

- Raymond J. Lucia and Raymond J. Lucia Companies (referred to collectively as Lucia) were accused of violating the Investment Advisers Act by the [Securities and Exchange Commission](#) (SEC). An SEC [administrative law judge](#) (ALJ) adjudicated the case and ruled against Lucia.

- Lucia petitioned the SEC for review, arguing that the administrative proceeding was unconstitutional because the presiding ALJ had not been properly appointed under the Appointments Clause.<sup>1</sup>

- The Appointments Clause requires (among other things) that “Officers of the United States” are to be appointed by the president with the advice and consent of the Senate. Congress may vest authority to appoint “inferior officers” in the president alone, the courts, or the heads of departments. Under Supreme Court precedent, an Officer of the United States is someone who “exercises significant authority pursuant to the laws of the United States.”

- At the time of Lucia’s case, the SEC allowed agency staff to appoint ALJs without the approval of the commissioners, who are considered department heads with the authority to appoint inferior officers. SEC commissioners themselves are appointed by the president on the advice and consent of the Senate.

- Reviewing Lucia’s appeal, the SEC “concluded its ALJs are employees, not Officers, and their appointment is not covered by the Clause.”

- Lucia filed suit in federal district court, arguing that the ALJ had exercised significant authority to interpret and apply the law and thus was an officer of the United States. The district court judge agreed with the SEC that ALJs were not officers within the meaning of the Appointments Clause. Lucia appealed.

- The United States Court of Appeals for the District of Columbia Circuit heard Lucia’s appeal. An attorney from the U.S. Department of Justice and counsel from the SEC argued the agency’s case. The court concluded that the commission’s ALJs did not qualify as “officers” under the Appointments Clause. However, the Tenth Circuit reached the opposite conclusion in a similar case (*Bandimere v. SEC*), holding that an SEC administrative law judge was an “Officer.”

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<sup>1</sup> The President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.” (Article II, Section 2, United States Constitution)

- Lucia appealed the DC Circuit opinion to the United States Supreme Court in July 2017. Lucia seeks, at minimum, a new hearing before an adjudicator appointed under the terms of the Appointments Clause. Lucia is also seeking outright dismissal of the SEC's enforcement proceeding.
- The Trump administration initially supported the appellate court's decision in *Lucia*. U.S. Solicitor General Noel Francisco then reversed the Trump administration's defense of the lower court's ruling on November 29, 2017, and stated that the administration would support the position that the SEC's ALJs were inferior officers subject to the Appointments Clause. Francisco urged the Supreme Court to hear Lucia's appeal in order to provide clarity on the issue for the SEC and other federal agencies.
- On November 30, 2017, the SEC announced that it had ratified the appointments of its ALJs in an effort to mitigate concerns over whether the agency's administrative proceedings violated the Appointments Clause.
- The Supreme Court granted *certiorari* in *Lucia v. SEC* on January 12, 2018.
- A number of organizations have filed *amicus curiae* briefs with the Supreme Court.

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## KEY FACTS: ADMINISTRATIVE LAW JUDGES

- ALJs preside over administrative hearings, usually involving a disagreement between the agency and an affected party. At the SEC, ALJs preside over enforcement actions, where they act as judge and jury in a trial-like proceeding. By comparison, the ALJs at the Social Security Administration mostly hear cases about benefits eligibility.
- According to an *amicus* brief filed by the [Pacific Legal Foundation](#) on behalf of Lucia, the SEC's Administrative Law Judge Cameron Elliot "heard testimony, including expert-witness testimony; accepted documents into evidence; considered and ruled on objections; weighed evidence; made factual findings; and reached legal conclusions" in the enforcement proceedings he oversaw against Lucia.
- The U.S. Office of Personnel Management (OPM) reported a total [1,931 administrative law judges](#) working at federal agencies as of March 2017. The vast majority of these ALJs (1,655) handle cases for the Social Security Administration. The SEC is listed as having 5 ALJs.
- According to reporting from the [New York Times](#) and the [Wall Street Journal](#), in recent years the SEC has won 88% of the cases it sends to its ALJs, compared to a 63% win rate in federal district court. In 2012 the agency won every in-house adjudication, and more than 75% of its ALJ proceedings in 2011, 2013, and 2014. By comparison, the agency prevailed in less than 75% of similar judicial proceedings those same years.
- The Administrative Procedure Act (APA) governs the appointment of ALJs and their scope of authority, including formal adjudication proceedings and hearings. ALJs are recruited and examined by OPM, then hired and paid by agencies. ALJs cannot be hired or fired at will, and they can only be removed from office for good cause by the Merit Systems Protection Board (MSPB). Agencies sometimes loan ALJs to one another using a process overseen by OPM.
- ALJ authority is limited to federal executive branch agencies—making ALJs part of the executive branch rather than the judicial branch. One major difference between ALJs and traditional judges (aka Article III judges) is that ALJs serve as both the judge and trier of fact.
- According to OPM regulations, agencies employing ALJs have "[t]he responsibility to ensure the independence of the administrative law judge" in all proceedings.
- ALJs are only one component of the administrative judiciary used by executive branch agencies. In addition to nearly 2,000 ALJs, federal agencies employ a total of [more than 10,000 non-ALJ adjudicators](#). These non-ALJs go by a variety of titles, such as "administrative judge," "hearing officer," and "immigration judge." Together, ALJs and non-ALJ adjudicators handle many more cases per year than the federal courts.



## LUCIA AND THE ADMINISTRATIVE STATE: WHY DOES IT MATTER?

- **Impact on ALJ independence:** Currently, ALJs can only be fired for good cause by the Merit Systems Protection Board (MSPB). If the Supreme Court determines that ALJs are inferior officers, the cause removal protections for ALJs under the APA could be deemed unconstitutional—thus strengthening executive oversight of ALJs.
- **Impact on pending and appealed SEC cases:** If the Supreme Court finds that ALJs are officers of the United States under the Appointments Clause, the validity of the SEC's administrative proceedings before improperly appointed ALJs and any cases on appeal could be called into question. As of January 2018, more than 100 cases were under consideration by SEC ALJs and a dozen cases on were on appeal in federal courts.
- **Impact on other agencies:** *Lucia* will have broader implications for administrative proceedings conducted by ALJs in other federal agencies. The Solicitor General stated that the case “affects not merely the Commission’s enforcement of the federal securities laws, but also the conduct of adversarial administrative proceedings in other agencies within the government.” Mark Perry, Supreme Court counsel for Raymond Lucia, notes that the majority of ALJs work for the Social Security Administration and would not likely be affected by a ruling in Lucia’s favor, but about 142 ALJs across other agencies “exercise significant power in enforcement proceedings” and could be subject to the Appointments Clause.

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